

Too Little, Too Late

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On 30 September, the European Commission has finally presented its long-awaited first edition of the new Annual Rule of Law Report, assessing the situation of the rule of law in all member states. In cases like Hungary and Poland, where the rule of law and democracy have been deliberately dismantled over the years, this monitoring approach, however, will hardly help. The report is unfortunately too little, too late. Instead, the EU needs to strengthen its enforcement capacity by linking breaches of the rule of law with actual sanctions.

The first Annual Rule of Law Report

The new Rule of Law Report is just one in the European Union's rule of law toolbox that has been gradually supplemented with new instruments, mainly because of serious backsliding tendencies in Hungary and Poland. In its 2019 communication [Strengthening the rule of law within the Union – A blueprint for action](#) the European Commission laid out a comprehensive plan to safeguard rule of law (and democracy) in the EU member states and thus uphold the values of Article 2 TEU on which the EU is founded. Apart from its idea to promote a rule of law culture, it also announced to establish an Annual Rule of Law Review Cycle that would culminate in the publication of an Annual Rule of Law Report. In her programme [A Union that strives for more](#) new Commission President Ursula von der Leyen outlined this new review cycle including the report under the heading of a new “Rule of Law Mechanism”.

On 30 September 2020 the Commission finally published its long-awaited first edition of the Annual Report, which is divided into a [summary report](#) covering overall developments in all 27 member states and [specific country](#) reports. The assessment is not limited to rule of law issues in the narrow sense, but also covers aspects that have a direct bearing on the rule of law, namely media pluralism, anti-corruption framework and institutional checks-and-balances. Moreover, it explicitly covers both negative *and* positive rule of law developments, highlighting both challenging and reassuring reforms in the member states (the overall tone is in fact rather positive, with a strong emphasis on positive developments, so as to encourage member states).

The documents are worth reading for all those interested in the rule of law in the European Union. The summary report demonstrates that rule of law challenges are not restricted to only a few states, and that these can be found in both “old” Western and “new” Eastern democracies, albeit to varying degrees. It also finds that in general, member states make serious attempts at improving for example the effectiveness of their judicial systems or their anti-corruption strategies.

Prevention but no sanctions

Expectations on the new Rule of Law Report have been especially high with regard to cases like Hungary and Poland. Previous attempts to discipline their governments through existing procedures like the Rule of Law Framework (Poland) or the Article 7 (1) TEU procedure (both) have not resulted in any significant change (just read the many comments and analyses on the EU's attempts to safeguard the rule of law published on *Verfassungsblog* over the last few years, for example [here](#) and [here](#)). Therefore, Commission Vice-President [Věra Jourová](#) argued in a recent interview with the German news magazine *Der Spiegel* (which by the way sparked massive protests, leading to the Hungarian government's demand that [Jourová resign](#)) that the comparative assessment of all EU member states would be helpful in the conflicts with Poland and Hungary by refuting accusations of double standards.

But is the Commission's new Annual Rule of Law Report really the solution to cases like Hungary and Poland? The answer is unfortunately no, and there are two major reasons for this.

First, it is a preventive instrument that “[will assist early detection of emerging rule of law problems wherever they appear](#)” by “[provid\[ing\] a synthesis of significant developments in the Member States and at EU level](#)”. As such, “it could highlight best practices and identify recurrent problems” (ibid.).

Identifying problems might be useful and might work in cases where illiberal tendencies or anti-democratic reforms are only beginning to unfold, like in Bulgaria or the Czech Republic.

The identification of problems and systemic deficiencies does not, however, make a difference in entrenched authoritarian regimes like Hungary and Poland anymore. Their governments have deliberately dismantled democracy and rule of law institutions, and have all along resisted the EU institutions' demands for change. Why should the report lead to a modification of their positions and policies? It is much more likely that they will simply reject the report's findings and continue questioning the Commission's objectivity on rule of law issues. In fact, Hungarian Minister of Justice [Judit Varga](#) has already claimed that the report's contents were unfounded because many of the organizations that served as sources were financed by George Soros. Poland's and Hungary's joint announcement to establish their own [rule of law institute](#) in Brussels to ensure that they are not treated unfairly and remain victims to Brussels' double standards is also a clear sign of this.

Moreover, rule of law problems and democratic deficits have already been sufficiently identified and documented by the Commission itself (think about the [four Rule of Law Recommendations issued within the Rule of Law Framework on Poland](#)) as well as other EU institutions, first and foremost the European Parliament. To mention just a few, the European Parliament's so called [Tavares Report](#) adopted in 2013 and its [Sargentini Report](#) from 2018 already demonstrated that the Hungarian democracy and rule of law suffer from several shortcomings. Similarly, just two weeks ago the Parliament adopted its most recent [resolution](#) “on the proposal for

a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law”, in which it neatly summarized the major shortcomings of Polish democracy and the rule of law. Therefore, when the report for example identifies a weakening of judicial independence, a lack of independence and effectiveness of the institutions overseeing the public media or pressure on civil society, it does not tell us anything new about the state of the rule of law in those two countries.

According to the Commission, the report’s findings should now serve as starting point for inter-institutional dialogues on the rule of law between Parliament and Council. Discussing new and troubling developments in democratic contexts seems reasonable and important. In cases like Hungary and Poland, however, it seems too late for such discussions, especially against the background of repeated discussions in the past, for example in the Parliament’s plenary debates. Just talking about troubling developments without acting is not enough anymore.

And this leads to the second reason, namely that there are no sanctions attached. The [Commission](#) announced back in 2019 that it would “make full use of its enforcement powers, if early detection and prevention measures are not effective”. However, negative findings in the report do not automatically lead to sanctions. The EU institutions *could* consider activating other instruments such as rule of law-related infringement procedures or the Article 7 (2) TEU procedure, but they are not obliged to do so. Instead of hard sanctions, the report can only rely on naming and shaming or social pressure. However, the deployment of other soft instruments relying solely on social pressure and dialogue, like the [Rule of Law Framework in case of Poland](#), did not lead to a termination or reversal of illiberal policies in the past either. Why then should we expect that it will be different after the publication of the Annual Rule of Law Report? Without sanctions, the report is just another rule of law instrument lacking enforcement capacity.

A useful instrument in cases of serious rule of law backsliding?

In brief, the Annual Rule of Law Report might be a useful instrument to provide policy-makers and the public with a comprehensive picture of the rule of law situation in the EU member states. As such, it could indeed become an early warning system for the European Union institutions by pointing out national deficiencies which would otherwise remain hidden. Also, it could serve as a catalyst for reforms in member states governed by reform-minded and EU-friendly governments. As [Věra Jourová](#) said: “[I]t fills an important gap, because we were missing a tool that would allow to identify problems at the early stage ... we already have infringement procedures, we have the Article 7 process, for instance, but these are the tools that allow us to react after it is often too late.”

Contrary to the high expectations placed on the report, the above mentioned reasons cast doubt on the premise, however, that it will become a game changer in the Union’s efforts to safeguard the rule of law on national level. Therefore, to finally

install a financial conditionality mechanism would be a good starting point in this respect.

